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May 13, 2004

Dockets Management Branch
Food and Drug Administration, Room 1061
5630 Fishers Ln.
Rockville, MD 20852

RE: Docket No. 2003P-0270/CP1

Dear Sir or Madam,

I am writing to let you know that the National Advertising Review Board (NARB) of the Better Business Bureau has ruled on the "Animal Care Certified" (ACC) case. As you can see in the ruling, which I've attached, the NARB affirmed the NAD's earlier decision that the ACC logo is misleading and recommended that the United Egg Producers either discontinue or modify the advertisement.

I am also attaching an article that ran on the Associated Press' national wire about the ruling.

As well, I have enclosed a recent survey of Washington, D.C. egg consumers, commissioned by COK and executed by the National Survey Center. This survey utilized face-to-face interviews with actual mock egg cartons with and without the ACC logo.

As the results show, most consumers report they would buy the ACC eggs rather than non-marked eggs because of the ACC logo's animal welfare claim. Further, most consumers thought it was more likely that ACC-labeled eggs come from free-roaming hens than non-labeled eggs, which is not the case.

I hope you find this information useful and want to thank you for your continued consideration.

Sincerely,

Paul Shapiro
Campaigns Director

Enclosures

2003P-0270

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Background

This is an appeal from a recommendation of the National Advertising Division (NAD) of the Council of Better Business Bureaus that the advertiser, United Egg Producers, Inc. (UEP), discontinue its "animal care certified" certification program. The challenge to the UEP certification program was filed by Compassion Over Killing, Inc. (COK).

COK contended that the certification program was misleading in that the "animal care certified" logo, accompanied by a check mark, communicated to consumers that egg producers displaying the certification symbol, or seal, raised their hens in a humane fashion, when, in fact, compliance with the UEP certification guidelines did not ensure conformity with that expectation. UEP argued that it was not a national advertiser and therefore the certification program was beyond NAD's purview, and in any event, that the certification seal did not state or imply a humane level of care. UEP's position was that the certification logo simply communicated compliance with the animal husbandry guidelines reflected in the UEP certification standards.

NAD found that it had jurisdiction over the challenge because the UEP licensed its seal to be used by producers in labeling and advertising throughout the US. On the merits, based on its own judgment and expertise, as well as certain survey evidence that NAD considered persuasive but not dispositive, NAD agreed with the challenger and found that the seal conveyed a message that hens raised in compliance with the certification program were treated more humanely than the level of care reflected by the guidelines. NAD recommended discontinuance of the program as presently constituted. UEP appealed.

Findings and conclusions

The panel affirms the NAD's conclusions with a somewhat different recommendation.

The parties did not argue the "jurisdictional" issue on appeal, and UEP did not mention it in its position statement. We take that to mean that the parties agree that at this stage it is preferable for the panel to consider the merits.¹

¹ UEP's preference for a decision on the merits makes sense—if NARB were to decide that the case is beyond the purview of self-regulation, the NAD's decision, analysis and recommendation contrary to UEP's position would be the last word on the issue from the self-regulation system. That would hardly benefit UEP. In any event, the national licensing of the UEP seal makes this an appropriate case for the NAD/NARB advertising review program. On the merits, UEP sought to introduce new material not considered by the NAD. Under the NARB procedures, evidentiary material or argument not presented to the NAD may not be considered. If the proponent of the new material can show that it is "newly discovered" evidence that is "significant" and "germane," the NARB may remand the matter to the NAD for further consideration. The additional evidence sought to be introduced on this appeal, largely pertaining to USDA and FTC consideration of the UEP certification program, is not "newly discovered" under the procedures.

The issues presented on the merits are important ones for the parties, consumers, and the self-regulation system. Certification programs are important tools for communicating to consumers that certain products or services meet defined standards as established by the certifying organization. Entities displaying a seal are able to assure consumers that an independent third party has determined conformity to the applicable standards, which may be relevant to a determination by many consumers to purchase the goods or services in question, or their willingness to pay a premium price for certified products.

The UEP guidelines were developed in consultation with scientific experts. The parties appear to agree that they represent some improvement over practices generally used in the industry, although the extent of that improvement is disputed. The guidelines deal with issues such as the environment--the space afforded for each hen, access to clean drinking water, fresh air access, maintenance of body temperature, beak trimming, and molting, the practice of depriving hens of food and water to manipulate the egg-laying cycle. Independent audits are required of producers who display the certification logo to assure compliance.

The UEP guidelines recommend increased space for hens in cages, in the range of 67-86 square inches, although producers need not reach the 67 inch minimum until 2008. (67 square inches, while an improvement, is not enough space for a hen to flap its wings.) The guidelines permit beak trimming in order to reduce pecking and cannibalism among the birds, although it may be done without anesthesia and thus painful. Finally, the guidelines suggest that molting longer than 4-5 days may give superior results, but require daily body weight loss monitoring and mortality, and recommend that mortality during the molting period should not substantially exceed normal flock mortality.²

COK submitted the only evidence of consumer perception in this case. A 2000 poll by Zogby, Inc. showed that 75.4% of respondents found it unacceptable to starve hens for over a week to induce molting, something that is possible under the UEP guidelines, for example; that 86.2% found it unacceptable to densely crowd hens in cages, also allowed by the guidelines (even the 67 square inch standard to become effective in 2008 is less than a typical 8 1/2 x 11 inch piece of paper); and that 60.4% found that partially removing hens' beaks (allowed by the guidelines) was not acceptable. In addition, 80.7% said they would pay more for hens raised in a "humane" manner. As COK persuasively argues, it is unimaginable that consumers would consider treatment they find "unacceptable" to be humane treatment, even if it is care improved from earlier conditions, or a practical reality of the economics of egg production in the US.

A 2003 Zogby poll indicated that 18% of respondents believed the label "animal care certified" means that chickens are treated humanely, or kindly, and that 13% believed the animals are "cared for." The survey evidence may well have some flaws that that might

² There was some disagreement as to whether the UEP guidelines were simply unenforceable recommendations, requirements applicable to all certification applicants, or something in between. In light of the panel's decision that the certification logo communicates conditions that are different than those allowed by any interpretation of the guidelines, we do not need to decide that question.

reduce its reliability. For example, we have no way of ascertaining from this record how accurate was the characterization of raw data. However, it is well settled that the NAD and NARB may conclude based on their expertise and judgment that there is an implied claim, even in the absence of any extrinsic evidence. Here, the COK evidence is corroborative of the NAD's sound judgment that many consumers will take away from the "animal care certified" logo a message that the level of care is more humane than allowed by the UEP guidelines.

We reach this conclusion for a number of reasons.

First, the certification logo itself makes a claim, indeed a facially ambiguous claim—"animal care certified." There can be no doubt that *at least one* reasonable interpretation of the claim is that there is a reasonable level of humane care provided. Advertisers must be prepared to substantiate all reasonable interpretations of a claim.

Second, the claim is made in the context of growing interest by many consumers in the treatment of animals, and a growing interest by retailers in being perceived as responsive to these customer concerns.³ In that context, whether the target is the average consumer lacking expertise in husbandry or a more activist consumer interested in promoting a high standard of care, it is difficult to accept that "animal care certified" would not imply care that exceeds the sort of conditions allowed by the guidelines.

Third, UEP's position that the logo communicates only compliance with its guidelines is undercut by the lack of any reference to UEP or its guidelines in the certification mark.

The panel is mindful that the essence of a certification program is to communicate compliance with a set of standards, and that those standards generally serve to define or limit the claim made by any seal or emblem used to indicate compliance. As a consequence, the panel's decision should not be interpreted to mean that a contrary perception by some consumers would be enough to defeat any certification program.

Here, however, as previously indicated, there is no reference to the certifying organization or to the underlying guidelines, which in an appropriate case might serve to qualify an otherwise broader message by the advertiser by communicating specific content or the identity of a trusted organization. In addition, UEP has to date made little or no effort to educate consumers regarding the guidelines that are applicable, and how to find them, either in a marketing and advertising campaign, directing consumers at point of sale to web site information or a telephone number or an insert where information is

³ UEP contended at the hearing that the certification program was only aimed at retailers, not consumers. The panel finds it hard to credit that assertion. The logo appears on individual egg cartons purchased by consumers, not simply on crates or invoices directed to retailers. In any event, intent is not relevant—the claim is communicated to consumers at the point of sale, whether or not that was the primary purpose of the program.

available, or as part of the logo itself.⁴ Any of these techniques, if handled effectively, as well as use of logo copy that does not imply the sort of broad message conveyed here, could alert consumers that the UEP certification is confined to the specific guidelines issued by UEP, and could help avoid the implication that the certification stands for much more than it does.

Recommendation

The panel recommends that the certification program either be discontinued in its present form or modified to more clearly communicate, through the UEP certification materials or as communication requirements placed on certified producers by UEP, that certification signifies the specific standard of care as set forth in the UEP guidelines.

Advertiser Statement

This statement shall serve as the response of United Egg Producers ("UEP") to the decision of the NARB, dated April 27, 2004. UEP appreciates the time and effort that the panel obviously devoted to this case. UEP further appreciates the Board's acknowledgment that the Animal Care Certified program is based upon science and that it represents an improvement in the welfare of the nation's flock of laying hens.

In response to the Board's recommendations, UEP is prepared, as recommended by the panel, to increase the extent to which the substantive significance of the guidelines is communicated to consumers. Given the significant improvement in welfare of laying hens caused directly by compliance of egg producers with the guidelines, we view such increased communication as a modest step that is consistent with the overall objectives of the Animal Care Certified program.

⁴ In this regard, it is certainly possible that use of the logo by an egg producer *might* result in a different conclusion were the producer to find a way to communicate the program content more effectively than UEP has done, such as on the egg carton itself.



<http://www.latimes.com/business/investing/wire/sns-ap-egg-labels,1,5322694.story?coll=sns-ap-investing-headlines>

AP: Better Business Bureau Nixes Egg Ads

By PATRICK CONDON
Associated Press Writer

9:26 AM PDT, May 10, 2004

DES MOINES, Iowa — The egg industry should stop advertising its products as humane as long as it continues such practices as clipping hens' beaks and depriving birds of food and water, according to a ruling issued Monday by the Better Business Bureau.

The ruling comes from the bureau's New York-based National Advertising Review Board, its highest authority on advertising issues. The board recommended that the United Egg Producers either discontinue labeling eggs as "animal care certified," or significantly alter it to stop misleading consumers.

"It is unimaginable that consumers would consider treatment they find 'unacceptable' to be humane treatment," the ruling stated.

The ruling upheld a November finding by a lower panel of the Better Business Bureau. Compliance with the recommendations are voluntary, but groups that refuse to do so are often referred to federal agencies like the Federal Trade Commission or the Food and Drug Administration.

The board found that the egg industry's standards have improved treatment of hens, but not to a level that most consumers would find humane.

Among the practices cited were forced molting, which is intentionally withholding food and water to make birds lose weight; partial beak clipping, without anesthesia, to prevent birds from pecking each other; and dense crowding of hens in cages that don't allow them to flap their wings.

United Egg Producers has said it awards the logo based on scientific standards developed by a group of independent experts. In its official response to the ruling, the group said it is prepared "to increase the extent to which the substantive significance of the guidelines is communicated to consumers."

The ruling stems from a complaint by Compassion Over Killing, a Washington, D.C.-based animal rights group.

Paul Shapiro, the group's campaigns director, said he hoped the ruling would bolster his group's case in complaints filed with the Federal Trade Commission and the Food and Drug Administration.

Telephone messages left for United Egg Producers, the U.S. egg industry's trade group, were not immediately returned.

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On the Net:

United Egg Producers: <http://www.unitedegg.org/>

Compassion Over Killing: <http://www.cok.net/>

National Advertising Division: <http://www.nadreview.org/>

If you want other stories on this topic, search the Archives at latimes.com/archives.

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National Survey Center

Market Research, Polling, Public Relations Since 1984

Date: April 15, 2004

To: Paul Shapiro

Re: Report on Egg Carton Contrast Survey

Methodology

During the week of March 22-26 of 2004, National Survey Center conducted 248 in-person interviews with individuals who described themselves as current and future egg purchasers. These interviews were conducted on a random basis in two separate grocery stores in Washington D.C. These grocery stores are located in two separate areas of the city and likely represent a diversity of opinion in the egg consuming population.

Locations

Safeway Food Store, Wisconsin Ave. Tenleytown March 22nd & March 23rd
Safeway Food Store, Georgia Ave. & Piney Branch Rd. March 24th & March 25th

Results Summary

A majority of respondents in this survey believe that the Animal Care Certified logo likely means that the hens who laid the eggs received better care or more humane treatment.

Although none of the respondents was familiar with the Animal Care Certified logo nor it's meaning, when asked to speculate, two-thirds of respondents believe that eggs with the logo are more likely to have been laid by hens who were free range/free roaming. In the reverse, two thirds of the respondents believe that eggs sold in the non-logo carton were more likely to have been laid by hens kept in cages.

When given a choice, three quarters of those surveyed say that they are more likely to purchase eggs in the carton with the logo. Less than 1% say they are more likely to purchase eggs without the logo.

4401 Connecticut Avenue, NW
Washington, D.C. 20008

(O) (202) 244-3937 Fax: 202 318-7516
E-mail: nationalsurveycenter@yahoo.com

Responses

(Please note: Actual numbers of responses are shown in parenthesis)

Question # 1

Do you buy eggs on a regular basis from a retail establishment?

Yes	93%
No	7%
Don't Know	0%

Question # 2

Do you plan to buy eggs from a retail establishment in the future?

Yes	93%
No	7%
Don't Know	0%

Note: Those who answered no to either of the first two questions were eliminated from the interview process.

Question # 3

When purchasing eggs, do you buy only specific types of eggs?

Yes, free range/free roaming/organic eggs (43)	16%
Yes other* (8)	3%
No** (196)	79%
Don't know (1)	1%

*Brown (5), Other (3)

** Those who indicated egg size only are included in the No response)

The interviewer has just shown you two cartons. Please keep those cartons in mind when answering the following questions.

Question # 4

*After looking at the two cartons carefully, which of these two – A or B – would you be **Most Likely** to purchase?*

Without logo	(4)	2%
With logo	(159)	64%
Both	(56)	22%
Neither	(15)	6%
Not Sure	(14)	6%

Question #5

Why did you choose that way? (In response to Question #4)

With Logo

Taken Care of /Treated Better (101)
Inspected/Certified (28)
Better/healthier eggs (11)
Because of logo (12)
Organic (2)
Other (5)

Without Logo

Don't know (2)
Would not have noticed logo (2)

Both

Would not have noticed logo (15)
Don't care/Does not matter (13)
Logo has no meaning/No difference (20)
Other (8)

Neither

Not sure (5)
No difference (10)

Not Sure

No difference (2)

Not Sure (11)

Other (1)

Question # 6

Are you familiar with the Animal Care Certified logo and what it means?

Yes 0 %

No 100 %

Don't Know 0%

(For Questions 7-11 – the interviewer will show you both cartons again.)

Question # 7

What does the logo on Carton A mean to you?

Better Cared For/ More Humane Treatment (151) 61%

Nothing (16) 6%

Certified/ Inspected (32) 13%

Other (14) 6%

Not Sure/Don't Know (15) 6%

Healthier Eggs (20) 8%

A majority of participants 61% assume that the Animal Care Certified logo means that the hens are treated with better care, or more humanely handled. Also, 13% indicate that they believe the logo indicates some official standards for the care and processing of hens/eggs. More than 4 out of 5 respondents believe the logo indicates a positive association.

Question # 8

*Between A and B above, which eggs are **More Likely** to have been laid by hens kept in cages? (Number of responses in parenthesis)*

No logo (166) 67%

With logo (17) 7%

No Difference (17) 7%

Don't Know (47) 18%

Question # 9

*Between A and B (above), which eggs are **More Likely** to have been laid by free-range/free roaming hens? (Number of responses in parenthesis)*

No logo (14)	6%
With logo (171)	69%
No Difference (22)	9%
Don't Know (41)	17%

Over two-thirds (69%) of those questioned believe that the carton with the Animal Care Certified logo was more likely to contain eggs laid by free-range/free roaming hens.

Question # 10

Are you less likely or more likely to purchase eggs with the Animal Care Certified logo over the carton without the logo? (Number of responses in parenthesis)

1. Less Likely (2)	1%
2. More Likely (186)	75%
3. No Difference (40)	16%
4. Don't Know (20)	8%

An overwhelming majority (75%) is more likely to purchase eggs with the logo on the carton than those egg cartons without the logo. A much smaller number, 16% say that the appearance of the logo makes no difference in influencing their purchasing decision.

Question #11

Why did you make that choice? (In response to Question #10)

Those respondents who said they were **more likely** to purchase eggs with the Animal Care Certified logo, gave the following reasons:

- Better care/More humane treatment (127)
- Because of logo/Certified (19)
- Better hygiene/Safer eggs (13)
- Better tasting/Healthier eggs (12)
- Free-range (11)
- Other (4)

Those who said they were **less likely** to purchase eggs with the Animal Care Certified logo, gave the following reason:

Not sure what logo means (2)

Those who responded to Question # 10 with **No Difference**, gave the following reasons:

Never pay attention (7)

Not sure what logo means (9)

Makes no difference/does not matter (12)

Logo means nothing (5)

Don't know (4)

Think all eggs are the same (2)

Don't know (1)

Those who responded to Question #10 with **Don't Know**, gave the following reasons:

Never Pay Attention (3)

Not sure what logo means (6)

Makes no difference/does not matter (1)

Means nothing (2)

Not graded by USDA (1)

Don't know (5)

Think they are the same (2)

A large majority (75%) of those surveyed believes that the logo indicates that they are free to assume that the hens are treated with better care, are inspected or certified by a regulated/official entity, and are safer and healthier.

End of Survey